

SERVICE DATE – JANUARY 4, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34364

VERMONT RAILWAY, INC.–PETITION FOR DECLARATORY ORDER

Decided: January 3, 2005

Vermont Railway, Inc. (VTR), a Class III railroad, filed a petition for declaratory order requesting that a proceeding be instituted to determine that the State of Vermont (Vermont) and the City of Wallingford (Wallingford) are prohibited from requiring VTR to obtain permits or other prior approval to construct a 1,700-foot spur track and rail-to-truck salt transload facility on a 39-acre tract near Wallingford, VT. VTR is concerned that the project could be delayed or defeated under Vermont's environmental and land use statute, known as Act 250, which requires a permit for various forms of land development, or under Wallingford's zoning regulations, which require separate permits for use approval and site plan approval. VTR argues that, under 49 U.S.C. 10501(b)(2) and 10901, such permitting requirements are preempted by, and intrude upon, the Board's exclusive jurisdiction over interstate rail operations.

Vermont and Wallingford (collectively, respondents) filed separate replies to the petition in which they contend that there is no controversy or uncertainty to resolve and, as a result, no basis for instituting a declaratory order. Respondents argue that it would be premature for the Board to issue a declaratory order, because VTR has not begun construction of the transload facility or spur track, does not have a contract with a supplier, has not applied for any permit, and does not own the land. Respondents also state that no action has been taken that would impede VTR's plans. Vermont separately argues that: (1) a proceeding is barred by sovereign immunity; (2) the proposed project is beyond the regulatory authority of the Board; and (3) the Federal Court for the District of Vermont initially held that Act 250 is not facially preempted by the ICC Termination Act (ICCTA).

PRELIMINARY MATTERS

In its petition, VTR requested the opportunity to reply to any opposition and, in accordance with that request, filed a Supplemental Petition, to which Wallingford and Vermont replied. Thereafter, VTR and Vermont filed letters and VTR filed another petition to supplement the record. Vermont replied in opposition to the petition to further supplement the record. A "reply to a reply" is normally not allowed by the Board's Rules of Practice. See 49 CFR 1104.13(c). In the interest of having a complete record and because no party will be prejudiced, however, the additional pleadings will be accepted. In both of its replies, Vermont requests that the Board hold this proceeding in abeyance until

a similar case involving Green Mountain Railroad and the State of Vermont has worked its way through the court system. VTR opposes holding the proceeding in abeyance because it is concerned that this would prolong the proceeding for an undefined period of time. This decision renders Vermont's request to hold the proceeding in abeyance moot.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). However, the Board sees no reason to institute a declaratory order proceeding in this matter.

There are numerous Board and court decisions that address the scope of preemption as it relates to state permitting requirements. The Board has noted that local governments may require railroads, in advance of construction, to share their plans when the activity is one for which another entity would require a permit. See Joint Petition for Declaratory Order — Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (Ayer), slip op. at 12 (STB served May 1, 2001). However, it is well-settled law that state and local regulation cannot be used to veto or unreasonably interfere with railroad operations (including facilities that are an integral part of the railroad's interstate operations). See Ayer and Auburn and Kent, WA — Pet. for Declar. Order — Stampede Pass Line, 2 S.T.B. 330 (1997), aff'd, City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). It should be noted that not all state and local regulations that affect railroads are preempted; localities retain certain police powers to protect the public health and safety; and state and local regulation is permissible where it does not interfere with rail operations. For further guidance, the parties may refer to the Board decision in Green Mountain Railroad Corporation — Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002) and the United States District Court for the District of Vermont's decision specifically addressing Act 250, in Green Mountain Railroad Corporation v. State of Vermont, et al., 1:01-cv-181 (D. Vt. Dec. 15, 2003), which is currently under review in the United States Court of Appeals for the Second Circuit, in No. 04-0366, Green Mountain Railroad Corp. v. State of Vermont.

Because the Board is not instituting a declaratory order, there is no need to address Vermont's sovereign immunity claims.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. VTR's petition for a declaratory order is denied.
2. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary